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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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November 3, 2003

To: The Chief Justice of the United States
Associate Justices of the United States

From: Judge David F. Levi

Re: Summary of the Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

BANKRUPTCY RULES

The Judicial Conference is transmitting amendments to three Bankruptcy Rules.

A. Bankruptcy Rule 1011

The proposed amendment to Rule 1011 is technical and changes the cross reference from Rule 1004(b) to Rule 1004 to account for a recent amendment of Rule 1004 that eliminated subdivision references.

B. Bankruptcy Rule 2002

Rule 5003(e) was amended in 2000 to allow government agencies to establish a single mailing-address register to receive correspondence. Consistent with that change, Rule 2002 would be amended to specify that copies of notices to creditors in a chapter 11 case must be sent to the address for the Internal Revenue Service set out in the Rule 5003(e) register.

C. Bankruptcy Rule 9014

Rule 26 of the Federal Rules of Civil Procedure requires a party to disclose information that supports its claims or defenses at the outset of litigation. The proposed amendment to Rule 9014 exempts "contested matters" from the mandatory Rule 26 disclosure provisions. Contested

matters usually are time-sensitive. Typically, they are resolved well before the time when disclosure would be required under Rule 26, rendering the mandatory disclosure provisions ineffective and counterproductive. A judge may require disclosure, however, in any particular contested matter. The disclosure requirements of Rule 26 will continue to apply to adversary proceedings.

CRIMINAL RULES

The proposed amendments to Criminal Rule 35 define “sentencing” as used in that rule as the “oral announcement of the sentence.” The oral announcement of the sentence would then trigger the seven-day period for making corrections to the sentence for an “arithmetical, technical, or other clear error.” The existing rule is ambiguous because “sentencing” can be construed to mean either the “entry of judgment” — which can be entered several days after the oral announcement — or “oral announcement of sentence.” Defining “sentencing” as oral announcement of the sentence represents the majority view of the courts of appeals that have addressed the issue.

EVIDENCE RULES

The proposed amendment to Rule 804(b)(3) requires “particularized guarantees of trustworthiness” indicating the reliability of an unavailable witness’s statement against penal interest incriminating the accused. Under the existing rule, the prosecution is only required to show that the statement is dis-serving to the declarant’s penal interest. The amendment is consistent with the standard governing a statement incriminating the accused as set out in *Lilly v. Virginia*, 527 U.S. 116, 134-135 (1999). The amendment does not modify the “corroborating circumstances that clearly indicate” trustworthiness standard applied to exculpatory statements.

HABEAS CORPUS RULES

The proposed amendments of the Rules Governing § 2254 Cases and § 2255 Proceedings clarify ambiguities, address gaps that have developed since the rules were enacted in 1976, and conform the rules to the Antiterrorism and Effective Death Penalty Act (Pub. L. 104-132 — AEDPA).

The § 2254 Rules govern challenges of state-court convictions, while the § 2255 Rules govern challenges of federal-court convictions. Many § 2254 Rules are similar or identical to the § 2255 Rules. (The rules committees declined to consolidate both sets of rules because too many problems emerged.) The amendments to Rules 1, 10, and 11 of the § 2254 Rules, and Rules 1, 10, 11, and 12 of the § 2255 Rules are stylistic only.

A. Rules 2 of the § 2254 and § 2255 Rules

The proposed amendments to Rule 2 in both sets of rules remove the existing requirement that the petition or motion must be signed by the petitioner, allowing others authorized by law to sign the petition or motion, e.g., "next friend." 28 U.S.C. § 2242 authorizes others to sign a petition, at least in § 2254 cases.

B. Rules 3 of the § 2254 and § 2255 Rules

The proposed amendments require a clerk of court to file a petition or motion, regardless of whether the petition or motion may be procedurally defective. Under the amendments, only a judge can refuse the filing of a petition or motion, because the consequences of a late filing are serious in light of AEDPA's one-year statute of limitations. The amendments are also consistent with the filing provisions in Federal Rule of Civil Procedure 5(e).

C. Rules 4 of the § 2254 Rules and § 2255 Rules

Rule 4 of the § 2254 Rules would be amended to permit a clerk of court to serve a copy of the petition by regular mail instead of certified mail, which is required under the present rules. The amendments also permit service on appropriate state officials instead of limiting service to the state attorney general alone. The amendments to Rules 4 of the § 2254 and § 2255 Rules explicitly permit the respondent to respond to a § 2254 petition or § 2255 motion by a motion, including a motion to dismiss.

D. Rules 5 of the § 2254 and § 2255 Rules

The proposed amendments adopt the practices of jurisdictions that explicitly provide an opportunity for the petitioner or movant to file a "reply" (traverse) to the respondent's answer or other pleading within a time fixed by the court. The proposed amendment to Rule 5 of the § 2254 Rules requires the respondent to state whether any of petitioner's claims is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations. Also, Rule 5 of the § 2254 Rules would be amended to require the respondent to provide copies of any brief filed by the prosecution in the appellate court and the appellate court's opinions and dispositive orders relating to the conviction or sentence.

E. Rules 6 of the § 2254 and § 2255 Rules

Rule 6 in both sets of rules would be amended to require the parties to provide reasons for requested discovery, a common practice already followed by the courts.

F. Rules 7 of the § 2254 and § 2255 Rules

The proposed amendments explicitly eliminate an arguable interpretation that the existing rules limit the types of materials that a party may submit to the court on its request.

G. Rules 8 of the § 2254 and § 2255 Rules

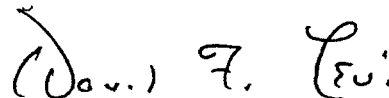
Rule 8 in both sets of rules would be amended to permit service of a copy of the magistrate judge's findings to be delivered not only by mail, as required by the present rules, but also by any of the Civil Rule 5(b) service methods.

H. Rules 9 of the § 2254 and § 2255 Rules

The proposed amendments delete provisions governing dismissal of a delayed § 2254 petition or § 2255 motion. AEDPA's one-year statute of limitations renders the provisions unnecessary and potentially confusing. The amendments also reflect the AEDPA requirement that the petitioner or movant obtain approval from the appropriate court of appeals authorizing the district court to consider a second petition or motion.

I. Model Forms for Filing a § 2254 Petition and a § 2255 Motion

The proposed revision of the forms simplifies the language and reflects the amendments to the underlying § 2254 and § 2255 Rules. The revision eliminates the existing lists of frequently cited grounds of relief, because they may cause confusion and may lead to inappropriate and wasteful claims filed by the petitioner or movant. The revisions also require information regarding earlier motions, petitions, or other applications concerning the judgment of conviction. Such information may be outcome determinative and bar further action under AEDPA's requirements.



David F. Levi
Chair, Committee on Rules of Practice
and Procedure

cc: Honorable A. Thomas Small, Advisory Committee On Bankruptcy Rules
Honorable Edward E. Carnes, Chair, Advisory Committee on Criminal Rules
Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules